

COMMERCE AND ECONOMIC GROWTH COMMISSION

Office of Business Services

TREASURY - GENERAL

DIVISION OF PROPERTY MANAGEMENT AND CONSTRUCTION

Minority and Female Contractor and Subcontractor Participation in State
Construction Contracts

Jointly Proposed Readoption With Amendments: N.J.A.C. 12A:10A and 17:14

Authorized by: William D. Watley, Chief Executive Officer and Secretary, New
Jersey Commerce and Economic Growth Commission and Robert L. Smartt,
Deputy State Treasurer, Department of the Treasury

Authority: N.J.S.A. 10:5-36(k) and (o), 52:17 et seq., 52:18A-30(d), 52:25-1 et seq., 52:27H-6(f), 52:32-17 et seq., 52:34-6 et seq., 52:34-12, 52:34-13, 52:27C-71 (q); 52:27C-73(a), (f) and (h); 52:27H-21.24 and 52:14B-1 et seq. and
Executive Order No. 84(1993)

Calendar Reference: See summary below for explanation of the exception to the
calendar requirement.

Proposal Number: PRN 2003-152.

Submit written comments jointly by July 4, 2003 to:

Joseph T. Grossi, Director

Office of Business Services

New Jersey Commerce and Economic Growth Commission

PO Box 820

Trenton, NJ 08625-0820

and

Edmund F. Jenkins, Director

Division of Property Management and Construction

Department of the Treasury

PO Box 230

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The agency proposal follows:

Summary

Subchapters 1, 2, and 3, were recodified from N.J.A.C. 12A:10-2, Minority and Female Subcontractor Participation in State Construction Contracts, and Subchapters 4 and 5 were adopted as new rules by 1994 d.310, effective January 3, 1995. See: 25 N.J.R. 4461(b), 27 N.J.R. 135(a).

The expiration date of Chapter 10A, Minority and Female Contractor and Subcontractor Participation in State Construction Contracts, was extended by gubernatorial directive from October 13, 1994 to March 31, 1995. See: 26 N.J.R. 4411(a).

Pursuant to Executive Order No. 66(1978), Chapter 10A, Minority and Female Contractor and Subcontractor Participation in State Construction Contracts, was readopted as R.1995 d.225, effective March 30, 1995. See: 27 N.J.R. 54(a), 27 N.J.R. 1814(a).

Pursuant to Executive Order No. 66(1978), Chapter 10A, Minority and Female Contractor and Subcontractor Participation in State Construction Contracts, was readopted as R.1998 d.200, effective March 26, 1998. See: 30 N.J.R. 603(a) and 1425 (a). The rules will expire on September 22, 2003.

The New Jersey Commerce & Economic Growth Commission has reviewed these rules, including the following amendments, and has determined them to be necessary, reasonable, and proper for the purpose for which they were

originally promulgated. The proposed amendments are technical in nature in that they replace references to the New Jersey Department of Commerce and Economic Development and the position of Commissioner with references to the New Jersey Commerce and Economic Growth Commission (Commerce Commission) and the position of Chief Executive Officer and Secretary (Secretary). The Department of Commerce and Economic Development, abolished by statute in 1998, was replaced by the Commerce and Economic Growth Commission. These administrative rules are promulgated pursuant to the Commission's authority under N.J.S.A. 52:27C-71 (q); -52:27C-73(a), (f) and (h); N.J.S.A. 52:27H-21.24 and -52:14B-1 et seq. The proposed technical amendments in N.J.A.C. 10A-1.1(a), (c); 1.2; 2.1(c); 2.2(a),(b),(c) ; 2.3; 3.1(a),(b)1-2; 3.2(a),(b); 3.3(a)1, 2 (b)1-5; 4.1(d)1,3; 4.2 (c)2; 5.1 (a), (b); 5.2 (a),(b),(c) and 5.3 delete the word "Commissioner" and replace it with "Chief Executive Officer and Secretary" and delete the words "Department of Commerce and Economic Development" and replace it with "Commerce and Economic Growth Commission" to accurately reflect the statutory change from the Department of Commerce and Economic Development to the Commerce and Economic Growth Commission. The contracting agencies provided in section 1.2(a) have been updated to reflect the current agency/institution names. The Division of Building and Construction is changed to reflect the current title of Division of Property Management and Construction in section 1.2. The Commerce Commission's address was changed from P.O. Box 835 to 820 in section 1.1(c) and section 2.3 was amended to correctly reference the procedures

for administrative hearings upon the denial of any contract from 17:12-3.1 through 3.6 to 17:12-3.1 through 3.4. 3.1(b)1 to clarify the annual registration fee of \$100.00 for small minority and women businesses and the minority and female business certification fee of \$75.00 pursuant to the period indicated in N.J.A.C. 12A:11-1.11. The Commerce Commission is allowing a 60 day comment period for this notice of proposal, therefore, the proposal falls under the to N.J.A.C 1:30-3.3 (a)5 exception to the requirement for calendar notice.

These rules apply to every agency and department of the State of New Jersey that is authorized to award construction contracts. These rules require that each State contracting agency make a good faith effort to award at least 15 percent of its contracts and/or subcontracts to eligible small businesses, at least 7 percent of its contracts and/or subcontracts to eligible minority businesses and at least 3 percent of its contracts and/or subcontracts to eligible female-owned businesses. These proposed rules also set forth the New Jersey Commerce and Economic Growth Commission's requirements and refined procedures for small, minority and female businesses to establish eligibility to compete for State contracting and subcontracting opportunities, including compulsory for formal certification as a minority or female business when bids or bid proposals are due.

These rules clarify the set-aside program requirements and procedures. The terms restrict set-aside eligibility to only those minority groups

for which there exists a compelling State interest remedial action as documented by the 1993 findings of the Governor's Study Commission on Discrimination in Public Works Procurement and Construction Contracts. These rules meet the strict scrutiny standard as articulated in the U.S. Supreme Court's decision in City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), which held that any race or gender based policy that is designed to remedy discrimination, in order to pass constitutional muster, must be narrowly tailored and justified by a compelling state interest.

The Agencies have reviewed the rules and determined them to be necessary, reasonable and proper for the purpose for which they were originally promulgated.

Following is a summary of the provisions of each subchapter of the chapter proposed for readoption.

Subchapter 1 contains provisions regarding purpose and scope and defines terms used in this chapter as well as the departments, colleges, authorities and commissions that must fulfill the set-aside goal requirements.

Subchapter 2 contains set-aside eligibility requirements for small businesses, minority businesses and female businesses. It also contains the

obligation of these businesses to provide information and details penalties for failure to provide complete and accurate information to the state.

Subchapter 3 details certification and registration procedures for small businesses and minority and female businesses as well as procedures for challenging a registered small business, or certified minority or female businesses.

Subchapter 4 details the set-aside program goals and procedures that State agencies must follow. N.J.A.C. 17:14-4.1 (12A:10A-4.1) clarifies that percentages shall be based on total dollar value of set-aside contracts and subcontracts thereunder and that dollar values shall be measured against the total dollar value of all publicly advertised contracts. The subchapter also makes clear the penalties in the event of noncompliance. Finally, this subchapter clearly states that State contracting agencies may follow Federal law or regulations regarding procurement procedures as appropriate.

Subchapter 5 describes the specific planning, reporting and review requirements of the State contracting agencies. In general, said agencies will submit a set-aside contracting plan for each fiscal year and quarterly progress updates to the New Jersey Commerce and Economic Growth Commission's Office of Business Services. It also makes clear in N.J.A.C. 17:14-5.2 (12A:10A-5.2) that non-set-aside contracts awarded to small or minority or female businesses shall be counted toward an agency's attainment goal. This subchapter

also describes the role of the New Jersey Commerce and Economic Growth Commission and the reports/data required from each State contracting agency to the Commission.

Social Impact

These rules are based on the disparity findings as presented in the Final Report of the Governor's Study Commission on Discrimination in Public Works Procurement and Construction Contracts issued on February 22, 1993 and Executive Order No. 84 (March 5, 1993) which established a narrowly tailored, remedial set-aside program to address documented discrimination.

These rules are expected to have a continuing positive social impact on the affected businesses and on the State as a whole because they will increase access to and opportunities for small business and minority and female businesses, whether they are prime contractors or subcontractors. The rules also are expected to address the need to establish a system that tracks actual work performed and dollars paid to subcontractors through public contracting.

Economic Impact

The rules in this proposed readoption are expected to contribute to the long-term economic growth of the State of New Jersey and to the health and vitality of the minority business and female business communities which have historically been underutilized in the public and private sectors. The growth

potential of the businesses taking part in the set-aside program should be enhanced, creating job opportunities and generating additional tax revenue.

To participate in the program, small minority and female businesses are required to pay an annual registration fee of \$100.00. In addition to annual registration, minority and female businesses must be certified pursuant to N.J.S.A. 52:27H-19 et. seq. and a %75.00 fee is required for the period indicated in N.J.A.C. 12A:11-1.11.

Federal Standards Statement

There are no Federal requirements applicable to the subject matter of the rules proposed for readoption. The rules are authorized by N.J.A.C. 52:18A - 30(d), 52:25, 52:34-6 et seq., 52:32-17 et seq., 52:27H-6(f), 52:34-12, 10:5-36(k) and (o), 52:34-13 and Executive Order No. 84(1993).

Job Impact

These rules establish procedures for the required participation of every agency and department of the State of New Jersey that is authorized to award public construction contracts. These rules, which are proposed for readoption, will result in the retention and creation of jobs. The retention and creation of jobs will occur as a result of small businesses, women and minority-owned businesses being awarded State goods and services contracts, which will then allow them to

grow their businesses. This growth of their businesses will permit them to maintain and expand their employment.

Agriculture Industry Impact

The Commission anticipates that the proposed amendments will have no impact on the agriculture industry.

Regulatory Flexibility Analysis

The rules proposed for readoption establish additional paperwork requirements for firms bidding on State contracts, many of which are considered small businesses as defined by the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. For specified contracts, bidders will be required to submit a minimum of two additional forms listing small, minority and female companies being proposed as subcontractors. Those firms failing to meet the State's goals or targets will be required to document their outreach efforts, detailing their solicitation of price quotes from small, minority or female subcontractors and/or suppliers. Prime contractors will also have to submit additional forms listing actual payments made to small, minority or female contractors. Small, minority and female businesses seeking to establish eligibility for participation in the set-aside program will be required to complete a simple registration form initially. However, all minority and female businesses must, in accordance with N.J.A.C. 12A:11, file all paperwork necessary to receive certification within 60 calendar days following the award of a contract or subcontract under these rules.

It is anticipated that the additional time and cost of the paperwork required by non-set-aside bidders will be minimal and that the public benefits of this program will outweigh the cost. The time and cost associated with the certification process may be somewhat more than minimal for some minority and female businesses. However, there is a need to ensure that only those businesses owned by groups for which a factual finding of discrimination has been documented benefit from the set-aside program. This need outweighs those costs. Therefore, no differing standards based on business size are offered.

Smart Growth Impact

Any impact with respect to the achievement of smart growth and the implementation of the State Development and Redevelopment Plan would be a result of the participation of Small Businesses, Female Businesses and Minority Businesses on projects within designated smart growth areas.

Full text of the readoption may be found in the New Jersey Administrative Code at N.J.A.C. 17:14 and 12A:10A.

Full text of the proposed amendments follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

12A:10A-1.1 (17:14-1.1)Purpose and scope

(a) The rules in this chapter are jointly promulgated by the [Department of Commerce and Economic Development] **Commerce and Economic Growth Commission** (hereinafter, "[Department of Commerce] **Commerce Commission**") and the Department of the Treasury to implement N.J.S.A. 52:32-17 et seq. and Executive Order No. 84, dated March 5, 1993, to establish a set-aside program that requires State agencies with contracting authority to make a good faith effort to award seven percent of public construction contracts and subcontracts to eligible minority-owned businesses and three percent of public construction contracts and subcontracts to eligible female-owned businesses. These percentage goals are overall program goals for each State contracting agency. State contracting agencies are expected to apply their business judgment when establishing set-aside subcontracting goals for individual contracts.

(b) (No Change.)

(c) Applications and questions regarding eligibility as a minority business or female business should be addressed to:

Set-Aside and Certification Office

[Department of Commerce and Economic Development] **Commerce and**

Economic Growth Commission

20 West State Street, [CN 835] **PO Box 820**

Trenton, New Jersey 08625-[0835] **0820**

12A:10A-1.2 (17:14-1.2)Definitions

The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise.

"Certification" means that a minority-owned or woman-owned business has been authenticated as being at least 51 percent owned and controlled either by minorities or females for participation in State programs requiring certification, as judged and determined by the Set-Aside and Certification Office of the [Department of Commerce and Economic Development] **Commerce Commission.**

"[Commissioner] **Secretary** " means the [Commissioner] **Chief Executive Officer and Secretary** of the [Department of Commerce and Economic

Development] **Commerce Commission** or his or her designee.

"Delegated purchasing authority" means the authority of a State agency to award contracts on its own pursuant to authority delegated to it by the Director, Division of [Building] **Property Management** and Construction (**DPMC**), as established in N.J.S.A. 52:34-7.

"Division of [Building] **Property Management** and Construction (**DPMC**)" means the State agency within the Department of the Treasury which provides a centralized design and construction contract procurement and administration service for other State agencies pursuant to N.J.S.A. 52:18A-151 et seq.

"State contracting agency" means any board, commission, committee, authority or agency of the State which possesses the legal authority to award and make construction contracts and includes the following except where expressly inconsistent with statutory authority:

1. DEPARTMENTS:

Agriculture

Banking **and Insurance**

Personnel

[Commerce, Energy and Economic Development]

Community Affairs

Corrections

Military and Veterans Affairs

Education

Environmental Protection

Health **and Senior Services**

Higher Education

Human Services

Insurance

Labor

Law and Public Safety

[Public Advocate]

State

Transportation

Treasury

2. COLLEGES:

[Glassboro State College]

New Jersey City [State College] **University**

Kean [College of New Jersey] **University**

Montclair State [College] **University**

New Jersey Institute of Technology

Ramapo College of New Jersey

Richard Stockton State College of New Jersey

Rowan University

Rutgers the State University of New Jersey

The College of New Jersey

Thomas E. A. Edison State College

[Trenton State College]

University of Medicine and Dentistry of New Jersey

William Paterson [College] University of New Jersey

3. (No Change.)

4. COMMISSIONS:

Beach Erosion Commission

Casino Control Commission

Commerce and Economic Growth Commission

County and Municipal Government Study Commission

Election Law Enforcement Commission

Executive Commission on Ethical Standards

Hackensack Meadowlands Development Commission

N.J. Commission on Capital Budgeting & Planning

N.J. Racing Commission

North Jersey Water Supply Commission

Passaic Valley Sewer Commission

Pinelands Commission

State Commission of Investigation

Commission of Science and Technology and all other departments,

colleges, authorities and commissions as may be established in the future.

12A:10A-2.1 (17:14-2.1) Standards of eligibility for minority businesses and female businesses

(a)-(b) (No Change.)

(c) Eligibility is formalized by the [Department of Commerce's] Commerce Commission's certification and/or registration and approval processes.

12A:10A-2.2 (17:14-2.2) Obligation to provide information and penalties for failure to provide complete and accurate information

(a) Applicants shall accurately and honestly supply all information required by the [Department of Commerce] **Commerce Commission.**

(b) When a business has been approved as an eligible female business or minority business on the basis of false information knowingly supplied by the business and

the business has been awarded a contract or subcontract on a State construction contract, the [Commissioner] **Secretary** of the [Department of Commerce] **Commerce Commission**, after notice and opportunity for a contested case hearing pursuant to N.J.S.A. 52:14B-10 and N.J.A.C. 1:1, shall:

1-3 (No Change.)

(c) Any business approved by the [Department of Commerce] **Commerce Commission** as a minority business and/or female business shall immediately apprise the Department of any circumstances which might affect the eligibility of the business under these rules.

(d) (No Change.)

12A:10A-2.3 (17:14-2.3) Right to hearing upon denial of contract

A bidder or contractor that is denied any contract or the right to bid on any contract because of a determination that it failed to make a good faith effort to solicit and award subcontracts to eligible minority and female businesses shall be entitled to an administrative hearing as provided by N.J.A.C. 17:12-3.1 through [3.6] **3.4**.

12A:10A-3.1 (17:14-3.1) Certification and registration procedures for minority

businesses and female businesses

(a) Certification procedures established by the [Department of Commerce] **Commerce Commission** are as set forth in N.J.A.C. 12A:11. Businesses awarded contracts or subcontracts based on their eligibility as registered minority or female businesses must file an application for certification with the [Department of Commerce] **Commerce Commission** no later than 60 calendar days after the award of the contract. In accordance with N.J.S.A. 52:27H-21.18, small businesses are not required to be certified.

(b) Registration procedures established by the [Department of Commerce] **Commerce Commission** are as follows:

1. Any business which seeks to register as a minority business and/or female business must apply to the [Department of Commerce] **Commerce Commission** and pay any applicable fees. For these purposes, the [Department of Commerce] **Commerce Commission** shall prepare a Vendor Registration Form. This form shall be available from the [Department of Commerce] **Commerce Commission** and the State contracting agencies.

i. (No Change.)

2. When an application for registration as a female or minority business is

approved by the [Department of Commerce] **Commerce Commission**, the Department will issue the newly registered business an approval notice and add it to the Department's female or minority vendors list.

3. (No Change.)

12A:10A-3.2 (17:14-3.2) Time for application to register as a minority business or female business

(a) A business may apply to the [Department of Commerce] **Commerce Commission** at any time to be registered as a minority business or female business and to be placed on the appropriate vendors list.

(b) If a business is to be considered as a minority or female business contractor or subcontractor on a specific contract for purposes of these rules, it must apply to the [Department of Commerce] **Commerce Commission** for purposes of registration no later than one day prior to the deadline for bids being received and opened by the State contracting agency.

12A:10A-3.3 (17:14-3.3) Procedures for challenging a business registered as a minority business or female business

(a) (No Change.)

1. A registration challenge shall be made in writing to the Set-Aside and Certification Office the [Department of Commerce] **Commerce Commission**, setting forth the factual basis for the challenge. The [Department] **Commerce Commission** shall provide a copy of the challenge and a notice granting the opportunity for a hearing to the challenged business. Where a particular contract is at issue, the [Department] **Commerce Commission** shall also provide a copy of the challenge to the contracting agency.

2. A registration challenge to the [Department of Commerce] **Commerce Commission** may concern only the qualification of a business under these rules as a minority business or female business. Any challenge to a business's qualifications to perform a contract shall be referred to the appropriate State contracting agency.

(b) When the [Department of Commerce] **Commerce Commission** receives a challenge, upon request of the business whose registration is at issue, the Department shall conduct a hearing on the matter as follows:

1. The [Department] **Commerce Commission** shall notify all interested parties of the time and place of the hearing, and of the right to attend and be represented

at the hearing.

2. The burden of proof lies with the challenger. However, the [Department] **Commerce Commission** may use its own resources to ascertain the validity of a challenge and the status of a business.

3. The hearing will be conducted by the designee of the [Commissioner] **Secretary** of the [Department of Commerce] **Commerce Commission**. This designee will issue a written report to the [Commissioner] **Secretary** within four working days following the close of the hearing.

4. At the discretion of the [Commissioner's] **Secretary's** designee, participants at the hearing may be permitted to file written exceptions to the hearing officer's report no later than two working days from the issuance of the report.

5. Thereafter, the [Commissioner] **Secretary** shall issue a final decision on the challenge and notify the parties by certified letter.

6. (No Change.)

12A:10A-4.1 (17:14-4.1) Remedial set-aside program goals and procedures

(a) - (b) (No Change.)

(c) (No Change.)

1-3. (No Change.)

i. - ii. (No Change.)

4. (No Change.)

(d) When the State contracting agency has made a determination that a contract is suitable for subcontract set-aside designation, the following provisions apply:

1. The public advertisement shall include the address and telephone number of the New Jersey [Department of Commerce's] **Commerce Commission's** Set-Aside and Certification Office and a notice to prospective bidders that set-aside goals, or reasonable efforts as required in N.J.A.C. 17:14-4.3 (12A:10A-4.3), must be met by any contractor receiving an award.

2. (No Change.)

3. (No Change.)

i. - iii. (No Change.)

iv. The [Department of Commerce's] **Commerce Commission's** lists of eligible minority and female businesses will be available from the State contracting agencies.

4. (No Change.)

12A:10A-4.2 (17:14-4.2) Non-remedial subcontracting target program and procedures

(a) - (b) (No Change.)

(c) (No Change.)

1. (No Change.)

2. For each subcontractable element, the State contracting agency shall review the appropriate vendor list of the [Department of Commerce] **Commerce Commission** to determine the number of eligible minority businesses and the number of eligible female businesses which may reasonably be expected to participate in the project, giving consideration to the geographic location of the project and the estimated dollar value of the subcontract.

3-6. (No Change.)

(d)-(h) (No Change.)

12A:10A-5.1 (17:14-5.1) Planning

(a) Within 60 calendar days of the finalization of the capital budget for each State contracting agency, that agency shall submit to the [Commissioner] **Secretary** of the [Department of Commerce] **Commerce Commission** a plan for complying

with the remedial and/or non-remedial programs as established by these rules.

The [Department of Commerce] **Commerce Commission** will assist any State contracting agency in the development of its plan, upon request. This plan shall include the following:

1-3. (No Change.)

(b) The [Department of Commerce] **Commerce Commission** shall review the plan to determine whether it is reasonably designed to achieve the State contracting agency's goal of awarding seven percent of its total contracting dollars to minority businesses and three percent of its total contracting dollars to female businesses.

12A:10A-5.2 (17:14-5.2) Reporting requirements

(a) Within 30 calendar days of the end of each State contracting agency's fiscal quarters, the agency shall file with the [Department of Commerce] **Commerce Commission** a report containing the following information prescribed by the Department:

1. (No Change.)

i. (No Change.)

2-4. (No Change.)

(b) Within 90 calendar days of the close of each State contracting agency's fiscal year, the agency shall file with the [Department of Commerce] **Commerce Commission**, in a format prescribed by the Department, an analysis of actual contracting dollars paid to all contractors and actual contracting dollars paid to minority businesses and female businesses, pursuant to set-aside contracts and subcontracts.

(c) All reports required by this subchapter shall be considered public records for the purposes of N.J.S.A. 47:1A-1 et seq. and shall be retained as part of the permanent records of the State contracting agency and the [Department of Commerce] **Commerce Commission**.

12A:10A-5.3 (17:14-5.3) Annual review

The [Commissioner] **Secretary** of the [Department of Commerce] **Commerce Commission** and the Treasurer of the State of New Jersey shall undertake an annual review of the operation and report to the Governor on the need for continuation or modification of the minority and female business set-aside programs contained in this chapter. This report shall be based upon the reports

submitted to the [Department] **Commerce Commission** and any other information deemed appropriate. The report will include performance data on compliance and deficiencies for each contracting agency and be publicly distributed as deemed appropriate.